

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

HIM KEA et al.,

Plaintiffs,

v.

ANTHONY LY et al.,

Defendants, Cross-
complainants and Respondents;

SOK HOUET PHAN,

Defendant, Cross-defendant
and Appellant.

B272268

(Los Angeles County
Super. Ct. No. NC059876)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Ross M. Klein, Judge. Affirmed.

Sok Houet Phan, in pro. per., for Defendant, Cross-
defendant and Appellant.

Anthony Kornarens, A Professional Corporation and
Anthony Kornarens for Defendants, Cross-complainants and
Respondents.

Sok Houet Phan (appellant) appeals from a judgment entered following a bench trial. The judgment invalidated a purported 2015 election of the Board of Directors of the Khmer Buddhist Association (KBA). Appellant was one of the declared winners of the invalid 2015 election.

Appellant was recently before this court in a related matter. In *Khmer Buddhist Association v. Phan* (Sept. 26, 2018, B272212) [nonpub. opn.], we affirmed a trial court judgment invalidating certain purported real property transfers from KBA to appellant's organization, the "Buddha For World Peace Organization" (BWPO), and awarding KBA \$1,052,337 for appellant's repeated and open violations of Penal Code section 496. We refer to the prior opinion as necessary.

Following the illegal transfers of property, appellant and other members of BWPO purported to hold a special election in January 2015. Appellant declared he had been elected vice chairman of KBA. We find that the evidence supports the trial court's findings that the purported 2015 election must be invalidated for numerous reasons, therefore we affirm the judgment.

FACTUAL BACKGROUND

KBA was formed in 1985 under the Nonprofit Religious Corporation Law. It was formed by a group of Cambodian refugees who fled the persecution of the Khmer Rouge. KBA was organized exclusively for religious purposes within the meaning of section 501(c)(3) of the Internal Revenue Code.

On December 2, 2011, in a matter pertaining to KBA, the superior court ordered that an election take place. In 2012, KBA held an election pursuant to the court order. The election results were contested, but resolved pursuant to a settlement agreement dated July 9, 2012.

Although the bylaws at the time required it, the 2012 KBA board declined to hold an election in January 2013.¹ In August 2013, Pang Khoun (Khoun) purported to transfer all of KBA's real property to three individuals, one of whom was appellant. On August 21, 2013, the KBA board disapproved the transfers. At KBA's demand, the property was returned to KBA. Appellant was expelled from KBA in 2013.

In January 2014, a new KBA board was elected. Nine members were elected: Anthony Ly; Elizabeth Serey; Chea Naysen; Tylor Kim Tay; Vongesa Weetchai; A. Lee C. Ngim; Kim Leng; Nanory Sam; and Chea Soy. Khoun declined to accept the results of the election. Khoun later purported to transfer, on behalf of KBA and for no consideration, six parcels of real property owned by KBA to BWPO. Khoun was acting unilaterally, and was not on KBA's board at the time. In November 2014, KBA filed a lawsuit to cancel the deeds and return the properties to KBA. The trial court granted summary adjudication in favor of KBA, and declared the transfers invalid. On September 26, 2018, this court affirmed the trial court judgment.

On January 11, 2015, a group of individuals including appellant and Khoun purported to hold an election of directors of KBA. Appellant was one of the declared winners of this election. Other purported elected board members following the January 2015 election were Khoun; Rattana Vat; Sugato Ban Kim; Seyha Aun; Channat Phann; Leab Linda Tan; Navy Sea; and Mony Sing.

¹ The bylaws were later amended to require elections once every five years.

PROCEDURAL HISTORY

On January 22, 2015, five individuals who are not parties to this appeal (plaintiffs) filed a complaint challenging the 2014 election pursuant to Corporations Code section 9418.² The challenge was untimely pursuant to section 7527, which requires such a challenge to be filed within nine months of the contested election.

The plaintiffs' first amended complaint (FAC), filed in February 2015, challenged both the January 2014 and the January 2015 elections. It was timely as to the January 2015 election.

Appellant filed an answer to the FAC on March 12, 2015, generally and specifically denying each allegation.

Respondents in this appeal, all of whom were elected to the KBA board in January 2014, filed this cross-complaint on March 19, 2015.³ The cross-complaint sought to determine the validity of the 2015 election. It named as cross-defendants appellant; Khoun; Sugota Ban Kim; Rattana Vat Sayha Aun; Channat Phan; Leab Linda Tan; Navy Sea; and Mony Sing.⁴ The cross-complainants (respondents) asked the trial court to declare the purported 2015 election null and void for numerous reasons.

On April 20, 2015, appellant filed a general denial to the cross-complaint.

² All further statutory references are to the Corporations Code.

³ Respondents, who were cross-complainants below, are Anthony Ly; Elizabeth Serey Keo; Chea Naysen; Tylor Kim Tay, and A. Lee Chou Ngim.

⁴ Only appellant has appealed from the trial court judgment in this matter; thus, he is the sole appellant.

A five-day bench trial went forward on January 4, 5, 6, 13, and 29.

On March 16, 2016, the court issued its statement of decision. The court found that there were multiple independent reasons that the 2015 election must be invalidated. First, the persons supposedly elected were not KBA members, although only KBA members are permitted to run for a seat on the KBA board. The court noted in particular that appellant was removed from KBA membership in February 2013 after the first time he received improper transfers of KBA's property. Second, notice of the election was not given as required by the KBA bylaws. Third, there was no quorum, as only approximately 75 to 98 people voted, a number well below the required quorum of registered members. Fourth, appellant and the other BWPO parties produced insufficient evidence that proxy voting was authorized, despite their later claim that an additional 410 votes were obtained by proxy. The KBA bylaws at the time forbade proxy voting in the absence of pre-established procedures, and no such procedures were in place at the time. Further, the proxy votes did not appear to be valid. Fifth, the bylaws did not authorize a general assembly for January 2015. Instead, the bylaws, as unanimously amended in October 2014, set the next general election for January 2019. Finally, the bylaws required the board to determine the location for the next general assembly, and the board did not make any such decision as to the purported general assembly called for in January 2015.

The court found that the 2014 election is legally binding. The 2015 election was declared invalid.

The court rejected the offer to conduct a new election supervised by the court. Instead, it found that the 2014 board is the lawfully elected board, and the next election is to take place in 2019.

On May 11, 2016, appellant filed his notice of appeal from the judgment.

DISCUSSION

I. Standards of review

We review the trial court's findings of fact for substantial evidence, and its conclusions of law de novo. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.)

II. Appellant may not challenge the validity of the 2014 election

Appellant makes several arguments challenging the validity of the 2014 election. First, he claims that respondents seeking to contest the 2015 election do not have proof that they were legally elected in 2014. He claims this is so because they did not file a statement of information with the Secretary of State pursuant to section 6210. He also claims that the 2014 board's amendments to the bylaws were illegal and in violation of the bylaws due to the board's lack of authority. Further, he argues that the trial court erred because the evidence does not support its decision that the 2014 election is legally binding.

Appellant may not challenge the 2014 election. Nor may he challenge any acts of the board elected in 2014. The 2014 election is "incontestable" in this proceeding due to the nine-month statute of limitations found in section 7527. The trial court noted that appellant and the BWPO parties "admitted" below that "the 2014 Board was in power in October, 2014 and the 2014 election is incontestable." Appellant's opening brief on appeal admits that "[d]etermination of the [v]alidity of the 2014 [e]lection is barred by the [a]pplicable [s]tature [*sic*] of [l]imitations." Appellant concludes: "In [v]iew of the foregoing,

the validity of the 2014 election is no longer justiciable and moot.”⁵

Thus, appellant was merely a defendant in a challenge to the validity of the 2015 election. His pleadings did not challenge the 2014 election, nor did his pleadings contest any other actions of the board. The present matter is a summary proceeding under section 9418 that properly challenged only the validity of the 2015 election. Appellant cannot now expand the issues.⁶

Finally, respondents raise the issue of standing. They argue that appellant lacks standing to maintain this appeal. The trial court found that appellant was removed from KBA membership in 2013. The trial court also found that neither appellant nor the other cross-defendants presented direct evidence that they were KBA members. Since appellant is not a

⁵ Appellant attempts to retract these statements in his reply brief, claiming that he never admitted that any challenge to the 2014 election is barred. We may properly decline to address these contradictory statements raised for the first time in appellant’s reply brief. (See *People v. Barragan* (2004) 32 Cal.4th 236, 254, fn. 5 [declining to address an argument raised for the first time in a reply brief].)

⁶ Appellant’s challenge pursuant to section 6210 was not raised below and is therefore also forfeited for this reason. (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281). Further, section 6210 does not require a corporation to file an amended statement of information whenever new directors are elected. Instead, it provides that the corporation may file an amended statement when certain changes in governance are made. (§ 6210, subds. (a) & (d).)

KBA member, respondents assert, he has no standing to seek relief under section 9418.⁷

Respondents mainly rely on *Sacramento Sikh Society Bradshaw Temple v. Tatla* (2013) 219 Cal.App.4th 1224 (*Sacramento Sikh*). In *Sacramento Sikh*, several former members of the society (defendants) refused to accept bylaws adopted in 1996 and a subsequent election. These defendants declared themselves the true representatives of the society and sent letters to the Franchise Tax Board and the IRS claiming to be in charge of the society. (*Id.* at p. 1230.) The society filed suit against the defendants for slander of title. The defendants filed a cross-complaint for breach of fiduciary duty, breach of the covenant of quiet enjoyment, declaratory relief, accounting and conversion. (*Id.* at p. 1231.) Because substantial evidence supported the trial court's decision that the defendants were not members of the society, the defendants lacked standing to assert claims against the cross-defendants on behalf of the society. (*Id.* at p. 1235.)

The present matter is distinguishable because appellant did not file a cross-claim in this action. Thus, he is not asserting any direct claims against KBA or its board. Instead, he was a cross-defendant below, defending against respondents' cross-complaint seeking to nullify the purported 2015 election. However, if appellant had attempted to challenge the 2014 election or any act of the board, under *Sacramento Sikh* he had no standing to do so. (*Sacramento Sikh, supra*, 219 Cal.App.4th at pp. 1231-1235.)

⁷ Section 9418 specifies that the validity of an election may be determined by the court if an action is filed "by any director or member, or by any person who had the right to vote in the election at issue after such director, member or person has exhausted any remedies provided in the articles or bylaws."

In sum, appellant may not challenge the propriety of the 2014 election. Any such challenge is barred by section 7527, which requires such a challenge to be filed within nine months. Nor did appellant affirmatively challenge the 2014 election below. Even if appellant did not face these procedural hurdles, he has no standing to challenge the 2014 election, as he is not a member or director of KBA. Therefore, we decline to address appellant's challenges to the 2014 election and the acts of the present, lawfully elected board.

III. Substantial evidence supports the trial court's determination that the 2015 election was invalid

The trial court invalidated the purported 2015 election for at least six independent reasons: (1) the persons "elected" were not KBA members, as required by the bylaws; (2) notice of the "election" was not given as required by the KBA bylaws; (3) the "election" was invalid because there was no quorum; (4) proxy voting was unauthorized and no pre-established procedures were adopted or followed, as required by the KBA bylaws; (5) the bylaws did not authorize a general assembly for January 2015; and (6) the election is invalid because the board of directors did not decide on the location for the general assembly.

We review the evidence supporting the trial court's factual decisions under the substantial evidence rule. (*Haraguchi v. Superior Court, supra*, 43 Cal.4th at pp. 711-712.) Under this rule, we may only make a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings made below. (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.) "We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . ." [Citation.]" (*Ibid.*) We may not reweigh the evidence or a trial court's

credibility determinations. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1319 (*Christian Research*).)

“A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the appellant’s burden on appeal to produce a record “which overcomes the presumption of validity favoring [the] judgment.’ [Citation.]” (*Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 595.) “An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong.” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) These rules apply when a person is self-represented. (*Leslie v. Board of Medical Quality Assurance* (1991) 234 Cal.App.3d 117, 121 [“Even though appellant is in *propria persona*, he is held to the same ‘restrictive procedural rules as an attorney’”].)

The record and the statement of decision contain substantial evidence supporting the trial court’s decision that the 2015 election was invalid. We briefly review the evidence supporting each independent reason for the court’s decision below. Appellant has failed to meet his burden of affirmatively showing error in the trial court’s decision.

A. Those who ran for election in 2015 were not KBA members

Only members of the KBA are permitted to run for a seat on the KBA board. Appellant was removed from KBA membership in February 2013, the first time he received improper transfers of KBA’s property. Khoun was removed from

KBA membership in December 2014. The same resolution removed other BWPO parties, to the extent they were ever members of KBA. The resolutions removing individuals from KBA membership were within the power of the KBA board. The trial court found the resolutions to be reasonable and proper, given that these individuals were members of an organization “which had misappropriated and attempted to sell KBA’s properties.” Other than Pang Khoun and Mony Sing, none of the other individuals purportedly elected to the board in 2015 presented any evidence that they were ever KBA members. The court noted that the cross-defendants “could have been called as witnesses or their membership applications (if any exist) offered into evidence. That did not occur.”⁸

This supports the trial court’s decision that the 2015 election must be invalidated because none of the candidates was a KBA member. In particular, appellant and Khoun were barred from membership in the KBA in 2013-2014, before the purported 2015 election.

⁸ Appellant points to evidence suggesting that certain of the individuals purportedly elected in 2015 were, in fact, members of KBA. Appellant directs this court to voluminous exhibits, some of which are hundreds of pages long, and fails to cite to any place in the reporter’s transcript where such exhibits were admitted at trial or used to prove membership. To the extent that portions of the reporter’s transcript are missing, appellant fails to argue that he in fact proved those individuals’ membership at trial. Respondents assert that appellant is referencing exhibits that were not, in fact, admitted at trial.

Appellant failed to prove the membership of those who ran in the 2015 election at trial, therefore the point is forfeited. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 (*Ochoa*) [“arguments not asserted below are waived and will not be considered for the first time on appeal”].)

B. Notice of the election was not given as required by the KBA bylaws

The KBA bylaws provide that “Notice of calls for the General Assembly shall be given by the Chairperson of the Board of Directors, not less than 15 days prior to the date for such meeting.” The evidence showed that the BWPO parties claimed to have sent out a notice on January 21, 2015, four days before the election. There was no testimony or other evidence as to whom the purported “notice” was sent. The notice was never received by respondents, who were registered members of KBA and would have seen the notice if it were sent to all members of the KBA.

This evidence supports the trial court’s decision that the 2015 election must be invalidated because notice was not properly given.

C. There was no quorum

The KBA bylaws require a quorum for a general assembly of “30% of the active members registered in the book of the Association, one month before the date of the General Assembly.” This quorum was not met for the purported 2015 election. The evidence showed that approximately 75 to 98 people appeared and voted. There were 863 KBA members at the time. Thus, for a quorum to exist, there had to be nearly 300 members present.⁹

This evidence supports the trial court’s decision that the 2015 election must be invalidated because there was no quorum.

⁹ In his opening brief, appellant claims there were 1,119 registered members of KBA at the time, which would raise the required number for a quorum.

D. The proxy voting was not permitted nor carried out in accordance with pre-established procedures

The KBA bylaws forbid voting by proxy at the general assembly unless pre-established procedures adopted by the board of directors are followed.

Appellant and the BWPO parties produced no evidence showing that any pre-established procedures were adopted or followed. Nor did they provide any evidence of an authorization to vote by proxy.¹⁰

Further, the trial court questioned the credibility of the evidence of proxy voting that appellant and the BWPO parties provided. They claimed an additional 410 votes were obtained by proxy. This was contradicted by the vote tally provided by the BWPO parties' official vote counter, who claimed that he had tallied the votes, and no more than 98 people voted.

The BWPO parties introduced a blank proxy that was supposedly sent with the January 21, 2015 notice. However, the trial court found the BWPO parties' claim to be "suspect" because "a four page proxy cannot be enclosed in the notice of election sent by post-card." Further, the BWPO parties never introduced into evidence original, authenticated, completed, filled-out proxy forms. In addition, the court noted, there was not enough time between the date the notices were supposedly mailed out (Jan. 21, 2015), and the date of the election (Jan. 25, 2015) for the

¹⁰ Appellant argues that section 9417 applies to allow members to authorize proxy voting. However, section 9417 only applies "[i]n the absence of a contrary provision in the articles or bylaws." (§ 9410, subd. (a).) Section 9417 confirms this by stating that the right to vote by proxy "may be limited or withdrawn by the articles or bylaws." The KBA bylaws forbid proxy voting in the absence of a pre-established procedure. Thus, section 9417 does not apply.

recipients to receive the notice, complete the proxy and return it in time for the election. The proxies were never authenticated, no chain of custody was provided and the purported proxy votes lacked any indicia of reliability. Further, appellant and the BWPO parties did not prove that the proxies were filled out or completed by KBA members. The proxies introduced at trial were filled out by the same black pen which was used to write down the totals of people who voted the day of the election, and most had the same handwriting, with the same type of check marks filled out in the same black ink. In addition to other suspicious characteristics, most were dated prior to the date notice of the election was allegedly sent out. The trial court concluded that the proxies “could not have been valid.”

We do not reevaluate the credibility of evidence. (*Christian Research Institute v. Alnor, supra*, 165 Cal.App.4th at p. 1319.) Thus, we defer to the trial court’s credibility determinations as to the alleged proxy votes produced at trial. The court’s determination that the proxies were “invalid,” combined with the failure of appellant and the BWPO parties to provide evidence of an authorized, pre-established proxy voting procedure supports the trial court’s determination that the election must be invalidated due to improper and irregular proxy voting.

E. The bylaws did not authorize a general assembly for January 2015

The KBA bylaws were unanimously amended in 2014, and the superior court implicitly found the 2014 amendments to be valid. Those amendments provided for a five-person board and a five-year term, with the next election to be held in January 2019. The trial court found the 2014 election to be legally binding, and implicitly approved the 2014 amendments with its decision that “the next election is to be conducted in 2019.”

The 2014 amendments to the bylaws provide that the next general assembly shall take place in January 2019. This supports the trial court's determination that the January 2015 general assembly was unauthorized.¹¹

F. The board of directors did not determine the location for the January 2015 general assembly

The KBA bylaws state: “[t]he Board of Directors will decide on the place for the General Assembly.” As set forth above, the board elected in 2014 is the lawfully-elected board. Appellant admits that this fact is now incontestable. Appellant and the BWPO parties provided no evidence that the board determined the location for the January 2015 general assembly. This further supports the trial court's determination that the January 2015 general assembly and election were invalid.

IV. Missing reporter's transcript

Appellant argues that the reporter's transcript for one entire day of the proceeding has been lost, apparently due to the court reporter's computer crashing. Appellant argues that this court has the power to set aside and vacate the judgment based on the missing transcript pursuant to Code of Civil Procedure section 914.¹² Appellant concedes that he has the burden of

¹¹ The trial court implicitly rejected the argument that a special meeting was called pursuant to sections 9410-9421. These provisions provide for special meetings “in the absence of a contrary provision in the articles or bylaws.” (§ 9410, subd. (a).) The sections do not apply since the bylaws precluded the use of this provision to call for elections less than every five years.

¹² Code of Civil Procedure section 914 provides that: “When the right to a phonographic report has not been waived and when it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, . . . the reviewing court shall have power to set aside and

proving error on appeal (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141), and contends that it is impossible for him to demonstrate such error without the reporter's transcript for each day of the trial. He asks that the judgment be vacated and the matter remanded for a new trial.

If a portion of the record of the proceedings is unavailable, California Rules of Court, rule 8.130(h) provides a resolution:

“(1) If any portion of the designated proceedings cannot be transcribed, the superior court clerk must so notify the designating party in writing; the notice must show the date it was sent. The party may then substitute an agreed or settled statement for that portion of the designated proceedings by complying with either (A) or (B):

“(A) Within 10 days after the notice is sent, the party may file in superior court, under rule 8.134, an agreed statement or a stipulation that the parties are attempting to agree on a statement. If the party files a stipulation, within 30 days thereafter the party must file the agreed statement, move to use a settled statement under rule 8.137, or proceed without such a statement; or

“(B) Within 10 days after notice is sent, the party may move in court to use a settled statement. If the court grants the motion, the statement must be served, filed, and settled as rule 8.137 provides, but the order granting the motion must fix the times for doing so.

“(2) If the agreed or settled statement contains all the oral proceedings, it will substitute for the

vacate the judgment.” Section 914 thus permits, but does not require, courts to vacate a judgment on the ground that the reporter's transcript of proceedings is unavailable.

reporter's transcript; if it contains a portion of the proceedings, it will be incorporated into that transcript.

“(3) This remedy supplements any other available remedies.”

An appellant's request for new trial may be denied where “the record strongly suggests an adequate settled statement could be reached. [Citations.]” (*Weinstein v. E. F. Hutton & Co.* (1990) 220 Cal.App.3d 364, 369 (*Weinstein*)). Appellant identifies no efforts on his part to agree to a settled statement.¹³

Further, the party requesting a new trial must demonstrate that the questions which the party desired to raise on appeal could not be properly considered without the missing reporter's notes. (*Lilienthal v. Hastings Clothing Co.* (1954) 123 Cal.App.2d 91, 93.)¹⁴ While appellant states generally that he is unable to demonstrate error without the missing reporter's transcript, appellant fails to provide specific arguments as to why

¹³ In his reply brief, appellant argues that he showed an inability to participate in preparing a settled statement due to his use of Cambodian language interpreters and his English language declaration dated January 18, 2017. Arguments made for the first time in a reply brief may be disregarded. (*Ochoa, supra*, 61 Cal.App.4th at p. 1488, fn. 3.) Further, appellant's access to interpreters and his extensive writing in this appeal undermine his position that a language barrier existed to negotiations of a settled statement.

¹⁴ The *Lilienthal* court analyzed former Code of Civil Procedure section 953e. However, “Code of Civil Procedure section 914 is derived from former Code of Civil Procedure section 953e. (Stats. 1943, ch. 1017, § 1, p. 2957.)” (*Weinstein, supra*, 220 Cal.App.3d at p. 369, fn.3.) Thus, we find the *Lilienthal* court's analysis persuasive.

there is no adequate alternative to vacation of the lower court's judgment. In the absence of a showing of specific prejudice from the loss of the transcript, we have no reason to find that a substitute, such as a settled statement, would not have been equally as effective. The *Lilienthal* court's reasoning is convincing: "Courts are too busy these days to repeat a . . . trial unless it is necessary to do so in the interests of justice." (*Lilienthal*, at p. 96.) Appellant has failed to demonstrate any sincere efforts to collaborate on a settled statement or that the interests of justice require a new trial in this case.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT